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NO. 83-1563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK WILLS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the Petitioner's substantive claim when the Petitioner waived the claim in state court by failing to follow state court procedural rules?

2.

Whether this Court should grant a writ of certiorari to examine the trial court's consideration of a prior uncounseled conviction before sentencing the Petitioner when said consideration of the prior conviction did not result in the court enhancing the Petitioner's sentence?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Frank Wills, was convicted in February, 1983, of theft by taking (shoplifting) after a jury trial. The trial court sentenced the

Petitioner to twelve months imprisonment. During the sentencing phase of the Petitioner's trial, the trial court considered a certified copy of an earlier conviction of the Petitioner for shoplifting. Petitioner did not object to the court's consideration of the prior conviction at the sentencing phase of his trial.

The Petitioner's conviction and sentence were appealed to the Court of Appeals of Georgia. Wills v. State, 169 Ga. App. 260 312 S.E.2d 367 (1983). In his brief to the Court of Appeals, the Petitioner alleged that the trial court had improperly considered the prior conviction because the Petitioner pled guilty to the prior offense and was not represented by counsel. After

considering the Petitioner's claim, the Court of Appeals dismissed the allegation because the Petitioner had not properly and timely followed state procedural rules. Wills v. State, supra at 262. Petitioner sought to obtain relief by petitioning for a writ of certiorari to the Supreme Court of Georgia. On January 19, 1984, the Supreme Court of Georgia denied the petition for writ of certiorari; case no. 40711. Thereafter, the Petitioner filed this petition for a writ of certiorari in the Supreme Court of the United States.

The essential facts surrounding the Petitioner's arrest and conviction are that the Petitioner entered a retail establishment in Augusta, Georgia, with his teenage son. While in the establishment, the Petitioner

inquired about a certain style tennis shoe. Subsequently, the Petitioner and his son began to exit the store without stopping at the cash register. Upon a check of the Petitioner, it was found that tennis shoes which were a part of the merchandise of the retail establishment had been placed in a bag carried by the Petitioner. Thereafter, the Petitioner was arrested, tried, and convicted of theft by taking. Wills v. State, supra at 260.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY DETERMINED THAT THE PETITIONER'S FAILURE TO OBJECT TO THE USE OF A PRIOR CONVICTION DURING THE SENTENCING PHASE OF HIS TRIAL PRECLUDED THE PETITIONER FROM RAISING THE ISSUE ON APPEAL.

The Petitioner contends that this Court should overlook the procedural posture of this case in the granting of a writ of certiorari. Respondent asserts that by failing to object to the trial court's consideration of the prior uncounseled conviction, the Petitioner waived his right to raise

the issue on appeal. Accordingly, the Court of Appeals properly ruled that the Petitioner was not entitled to have the issue considered on appeal.

After Petitioner was found guilty by a jury, the trial court requested evidence concerning aggravating and mitigating circumstances it should consider in sentencing the Petition. Wills v. State, 169 Ga. App. 260, 262, 312 S.E.2d 367 (1983). A certified copy of an earlier conviction for shoplifting was tendered to the trial court by the solicitor. The document was not formally admitted into evidence at trial. Wills v. State, supra at 262. Before presenting the document to the trial court, the district attorney presented the document to Petitioner's trial counsel. Petitioner's trial counsel

made no objection to the trial court considering the document. Wills v. State, supra at 262. Petitioner was sentenced to 12 months imprisonment pursuant to O.C.G.A. § 16-8-12; Ga. Code Ann. § 26-1812. (Penalties for theft by taking).

Subsequently, after the Petitioner was sentenced, the Petitioner's counsel filed a motion for new trial wherein he alleged that the trial court improperly considered the prior conviction when sentencing the Petitioner. The motion for new trial was denied. Thereafter, the Petitioner sought to raise the issue of the trial court's consideration of the prior conviction on appeal even though no objection was made at trial. The Court of Appeals considered the Petitioner's contention and held that:

> The record reflects that [Petitioner] was shown the certified copy of the prior conviction but made no objection to the admissibility of the document on any ground, nor did [Petitioner] voice any objection to a consideration by the trial court in the sentencing process. That being so, [Petitoner] is not entitled to raise this issue for the first time on appeal and thus presents nothing in this context for this Court to review. (citations omitted).

Wills v. State, supra at 262.

In Georgia, it has long been the law that in order to preserve an issue for appeal a contemporaneous objection must be made at trial. See Arline Ex'or v. Miller, 22 Ga. 330 (4)(1857). In Starr v. State, 229 Ga. 181, 190 S.E.2d 58 (1972), the Supreme Court of Georgia stated that:

> This court has held on occasions too numerous to recount that, though there may be a ground of objection to evidence which would have been good if made at the proper time, yet, if the objection made be not good or not made at all or made for the first time in the motion for new trial or made only before this Court, the Supreme Court being a court

> alone for the trial and correction of errors of law committed in the trial court, will not set aside the verdict and judgment of conviction on account of the admission of such evidence. (citations omitted).

Starr v. State, supra at 183. (emphasis added). As noted in the above quotation, the Supreme Court of Georgia has specifically stated that challenges to evidence made for the first time in a motion for new trial will not be considered by the appellate courts.

In its opinion, the Court of Appeals of Georgia cited McKisic v. State, 238 Ga. 644 (5), 234 S.E.2d 908 (1977), for the proposition that Petitioner's failure to object at

trial to the consideration of the prior conviction precluded the Petitioner from raising the issue on appeal. The facts in McKisic are similar to the facts in the instant case in that the appellant in McKisic alleged that the trial court improperly considered a presentence report prior to sentencing the appellant. The presentence report contained the record of a previous conviction where the appellant was not represented by counsel. The report was not introduced into evidence. Additionally, as in the instant case, counsel in McKisic did not object to the consideration of the report at trial. The Supreme Court of Georgia stated that, "any objection to the court considering such a report must be deemed waived." McKisic v. State,

supra at 647. Accordingly, the courts in Georgia have maintained that a contemporaneous objection must be made at trial to preserve the issue for appellate review.

In Henry v. Mississippi, 379 U.S. 443 (1965), this Court considered the effect a failure to abide by state procedural rules would have on constitutional rights. It is Respondent's contention that the Petitioner has not presented to this Court any violation of a constitutional right. However, Respondent notes that in Henry v. Mississippi, this Court stated that when a state procedural rule serves a legitimate state interest this Court will allow the decision on the state procedural rule to stand. Henry v. Mississippi, supra at 447. In the

instant case, the state contemporaneous objection rule serves to allow the trial judge to make a determination about evidence to be admitted at trial.[1] As shown with the citations of authority above, Georgia courts have long adhered to the rule that a contemporaneous objection must be made to preserve an issue for appeal.

Petitioner contends that he sufficiently complied with the contemporaneous objection rule by moving for a new trial and alleging as a part of his motion that the trial

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[1]The documents in question were submitted to the trial court during the sentencing phase of the trial.

court improperly considered the prior conviction during sentencing. However, Georgia law specifically and clearly holds that allegations contained in a motion for new trial cannot relieve a petitioner of his failure to abide by the contemporaneous objection rule. See Starr v. State, supra at 183.

The Court of Appeals of Georgia properly held that the Petitioner failed to object to the consideration of a prior conviction by the trial court. Petitioner's failure to object precluded him from raising the issue on appeal. Accordingly, Respondent respectfully asserts that the Petitioner's allegation does not present any issue for review by this Court.

B. THE JUDGMENT OF THE COURT OF APPEALS OF GEORGIA IS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND, THEREFORE, PETITIONER HAS NOT IDENTIFIED A FEDERAL CONSTITUTIONAL ISSUE FOR REVIEW BY THIS COURT.

Petitioner contends that the Court of Appeals of Georgia improperly declined to consider an issue which was not properly objected to at trial. Respondent asserts that the Court of Appeals properly declined to hear the issue because the Petitioner did not abide by the Georgia contemporaneous objection rule. Therefore, the Court of Appeals'

decision was based on an adequate and independent state ground and this Court is presented no issue for review.

This Court has consistently abided by a self imposed principle that it will not review a state court judgment based upon an adequate and independent state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corporation v. Muller, 296 U.S. 207 (1935). In explaining this policy, the Court said:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, and not to revise opinions. We

are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts after we corrected its use of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

In the instant case, Petitioner contends that this Court should review an issue which the Georgia Court of Appeals refused to consider because of the Petitioner's failure to make an objection at trial. The courts in Georgia

have adherred to a long standing principle that a contemporaneous objection is necessary to preserve an issue for appeal. Accordingly, the Court of Appeals properly determined that the Petitioner failed to preserve the issue for appeal when he failed to object at trial. The Court of Appeals' decision properly disposes of the issue in question. Therefore, Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court and which has not been properly disposed of on an independent state ground.

C. PETITIONER'S TERM OF IMPRISONMENT WAS NOT ENHANCED BY THE TRIAL COURT'S PROBABLE CONSIDERATION OF A PRIOR UNCOUNSELED CONVICTION DURING THE SENTENCING PHASE OF HIS TRIAL.

The Petitioner alleges that the trial court improperly considered a prior uncounseled conviction in determining and "enhancing" the Petitioner's conviction. Respondent contends that the trial court properly considered the prior conviction in that no objection to said conviction was made at trial. In any event, the trial court properly sentenced the Petitioner to a term of imprisonment

in accordance with the amount of punishment provided for the crime for which the Petitioner was convicted. The trial court did not "enhance" the Petitioner's term of imprisonment in violation of any federal constitutional right.

The Petitioner's substantive issue is that the trial court erred by considering a prior uncounseled conviction before imposing sentence at trial. Petitioner relies upon the case of Baldasar v. Illinois, 446 U.S. 222 (1980), to support his contention. In Baldasar v. Illinois, this Court stated that the Illinois trial court could not use a prior uncounseled conviction to "convert a subsequent misdemeanor into a felony." Baldasar v. Illinois, supra at 222. In essence, this Court held

that a prior uncounseled conviction could not be used to enhance a subsequent sentence.

In a concurring opinion, the Court stated that the petitioner in Baldasar was sentenced to an increased term of imprisonment "only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense". Baldasar v. Illinois, supra, at 224 (Stewart, concurring). The Court did not state, or intimate that a prior uncounseled conviction could not be considered by the trial court, or could not be used for any purpose.

In the instant case, the trial court did consider the prior uncounseled conviction before announcing the Petitioner's sentence. However, the prior uncounseled

conviction was not used for the purpose of enhancing the Petitioner's sentence from a misdemeanor to a felony. Indeed, according to the statute which designates the appropriate sentences for the crime of shoplifting, the trial court could have sentenced the Petitioner to his present sentence without considering any prior convictions. O.C.G.A. § 16-8-2; Ga. Code Ann. § 26-18-02 (theft by taking); O.C.G.A. § 16-8-12; Ga. Code Ann. § 26-18-12 (penalties for theft by taking); O.C.G.A. § 17-10-3; Ga. Code Ann. § 27-2506 (punishment for misdemeanors).

According to the statute which designates sentences for theft by taking, the Petitioner could be sentenced to twelve months imprisonment. In this case, the

Petitioner was sentenced to twelve months imprisonment for said crime. Although the prior uncounseled conviction may have been considered before determining the Petitioner's sentence, it was not used to enhance the Petitioner's sentence as prohibited in Baldasar v. Illinois. In other words, the trial court sentenced the Petitioner to a term of imprisonment which is within the range allowed by statute for the crime committed.[2]

Baldasar v. Illinois, which the Petitioner specifically relies upon, is also distinguishable because in

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[2]In Baldasar v. Illinois, the Petitioner's sentence was enhanced pursuant to an enhancement statute. In the instant case, no such statute was invoked by the state.

Baldasar, defense counsel objected to the consideration of the prior uncounseled conviction before the trial court considered it. Baldasar v. Illinois, supra at 223. As stated in the procedural history portion of this brief, the first time any objection to the use of the prior conviction was raised in this case was in the motion for new trial. The objection was then untimely. McKisic v. State, 238 Ga. 644, 234 S.E.2d 908 (1977); Star v.State, 229 Ga. 181, 190 S.E.2d 58 (1972).

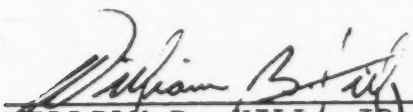
For all the above reasons, Respondent respectfully submits that even if the Court of Appeals should have considered Petitioner's contention, said contention does not present an issue for review by this Court because the facts in this case

are not within the parameters of Baldasar v. Illinois.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that either there exists no federal question for review by this Court as to the Petitioner's claims and, further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,



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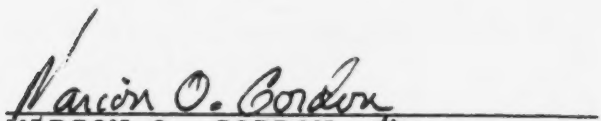

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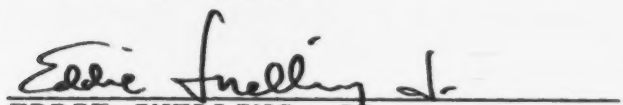

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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR. a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petition by depositing three copies of same in the United States mail with proper address and adequate postage to:

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This 5th day of June, 1984.

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